



**Office of the Attorney General
State of Texas**

DAN MORALES
ATTORNEY GENERAL

August 23, 1993

Mr. William D. Gooch
Director and Librarian
Texas State Library
State Archives and Library Building
P.O. Box 12927
Austin, Texas 78711-2927

Open Records Decision No. 617

Re: Open Records procedures applicable to
state agency records stored in Records
Management Division records center (RQ-20)

Dear Mr. Gooch:

You have requested our opinion on questions relating to the duty of the Texas State Library to respond to certain requests for information under the Texas Open Records Act (the "act"), V.T.C.S. article 6252-17a. You have received several requests to review copies of master microfiche jackets that are kept in a vault in the Records Management Division (the "RMD") of the state library. Your question does not require us to determine whether certain state records are subject to public disclosure, but rather to determine the proper procedure for obtaining access to state records that are stored at the Texas State Library on behalf of state agencies.

Subchapter C of chapter 441 of the Government Code mandates the creation of a records management division within the state library to manage state records in conjunction with the records custodians of all state agencies. Each state agency is required to establish a program for the efficient management of agency records. Gov't Code § 441.037(1). As part of this program, each agency is required to develop and submit to the RMD for approval a schedule for records retention, proposing the length of time that certain kinds of state records maintained by that agency should be retained. *Id.* § 441.037(3). Each agency is also required to develop a plan for storage of records prior to their scheduled date of destruction. As part of such a program, a state agency may choose to transfer documents not yet scheduled for destruction which are not in current use to the RMD for storage in the State Records Center (the "center"). (In fact, state agencies are encouraged to use the storage facilities of the State Records Center, as the center is specially equipped to provide the best climate for preservation of documents, and designed for optimal use of space). State records transferred to the RMD pursuant to interagency contracts are also stored in the center until they are scheduled for destruction.

One of the duties of the RMD is to operate a photographic laboratory capable of microfilming state records upon the request of state agencies. *Id.* § 441.038. State agencies make use of these services in various ways. For example, an agency may request that the RMD microfilm documents that are to be stored at the center prior to the scheduled date of destruction of the documents. An agency might also request that copies scheduled for destruction be microfilmed, so that the agency can retain a permanent record

of the documents even though it is not required to do so. When requested to microfilm documents, the RMD usually retains what is referred to as the master jacket, which is the original microfilm, and creates a microfiche copy that it provides to the agency. Once a microfilm copy is created, the RMD may destroy the source copy in accordance with provisions of the Government Code.¹

You advise that the state library has been served with a written request for access to the original microfilm copies of certain records produced by the state library and currently stored in the RMD's microfilm vault. The records were originally compiled by the Texas State Board of Veterinary Medical Examiners (the "TSBVME").² The source records requested on this occasion were lawfully destroyed after the microfilming, and the TSBVME was provided microfiche duplicates of the original microfilms. Your office declined to provide the requestor access to the master microfilm copies, but instead referred him to the TSBVME for access to the requested information.

You ask whether the director and librarian of the state library properly handled this request, or whether the state library is required to provide access to the original microfilm. We conclude that the director is not the officer for public records with respect to the records of the TSBVME transferred to the RMD for storage in the Center, and that the requestor was properly referred to the TSBVME.³

Although your specific question involves a request to review microfilmed documents, we answer your question as it more broadly applies to an open records request for any state records, regardless of the medium, that are stored by the RMD of the state library pursuant to subchapter C of chapter 441 of the Government Code. We do not believe that the temporary transfer of an agency's state records to the RMD for preservation changes the fundamental status of the records.⁴

¹The agency may also transfer the replaced record to the director, who, with the consent of the state auditor, may then further transfer or destroy the record. *Id.* § 441.035(a). Alternatively, the agency may itself destroy such records, but only with the approval of the director and, in the case of fiscal records, the state auditor. *Id.* § 441.035(c).

²The specific request was for access to "[m]icrofilm copies of [TSBVME] Hearing Files 1956 through 1985, Reel #1, Smith, Seymour J. 1078 through Reel #4, Baker, Dr. John M., 3227--as described on RMD 102 Form of the State Records Center . . ." The request would appear to be for access to TSBVME records entitled "Hearing Files" compiled during the years 1956 to 1985.

³This situation differs from that dealt with in Open Records Decision No. 576 (1990). In that case, the records at issue, which related to the Bingo Enabling Act, were in the possession of the Comptroller's office, which had originally been the agency charged with supervision of bingo. The Comptroller's office held those records as the contractual agent of the Texas Alcoholic Beverage Commission, which was its statutory successor. The relation of the comptroller to the relevant records was therefore much more direct than is that of the RMD to the records at issue here. In particular, the Comptroller's office, which had originally generated many of those records, was in a far better position to assess any possible arguments for exempting such records from disclosure under the act than is the RMD.

In effect, the RMD serves as a warehousing facility for state agencies. Requests for information from a state agency should be directed, as any other open records request would be, to that agency. Accordingly, the ten day deadline for asserting any exceptions to the act begins to run when the agency, not the RMD, receives a request for the information. If the agency stores the requested records at the RMD, the agency should make a prompt request to the state library for the requested documents in accordance with Government Code section 441.059. The requesting agency should process the open records request as it would any other request.

Requests for microfilmed documents should be handled in the same manner. In most instances, if the requested documents have been microfilmed, the originating agency should have the microfiche that the state library had already provided it at the time of the microfilming. If the agency no longer has the microfiche, it can request that the RMD provide the agency with another copy of it.⁵ The RMD will reproduce another microfiche from the master jacket it retains in the RMD vault, which will be delivered promptly to the agency so that the agency can comply with the citizen's open records request.

This procedure makes sense for a number of reasons. As previously stated, the RMD is essentially no more than a warehouse for the documents it stores on behalf of an agency. It is not in a position to review records requested for confidentiality or to raise any possible exceptions to an open records request that the agency that generated the record may want to raise. Further, the RMD at any one time stores hundreds of thousands of documents on behalf of state agencies; it is simply not equipped to deal with what might be hundreds of requests a day for such documents.

There are a number of points that should be stressed in reaching the conclusion we reach as to the proper procedure for accessing documents stored at the RMD. First, the agency to whom the request is directed must make documents that are in the RMD available to the requestor, unless such documents fall under one of the exceptions to the Open Records Act. An agency should not decline to process a request because documents requested are housed in the RMD. Neither should an agency represent to a requestor that the agency does not have documents that may be responsive to the request because the documents are stored in the RMD. The agency has legal custody of the documents that are stored in the RMD. It is the agency, and not the RMD, that is required to comply with the Open Records Act when its documents are requested.

⁴State records that constitute part of the archives of an executive agency's records may be preserved by making photographic reproductions, either at the request of the head of the department or institution or on the director's own initiative. *Id.* § 441.038(a). The director may provide for photographic reproduction only with the consent of the head of the department or institution, however.

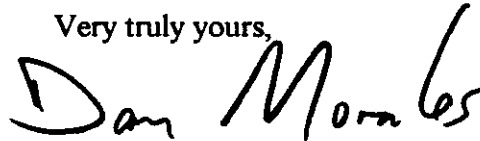
⁵Such a request must be processed expeditiously, so that the agency is able to meet the ten day deadline mandated by the act. Since the deadline is firmly set by the act, the agency must assert any exceptions it thinks may be applicable within that time by letter. If the agency has not yet received a particular microfiche within the deadline, it should assert every exception that may apply, explain that it does not yet have a copy of the document, and send this office a copy of the document as soon as it receives one.

Moreover, the RMD of the state library is not beyond the reach of the Open Records Act. Our decision deals only with the documents that are in the legal custody of other agencies, for which the RMD acts only as a caretaker. The RMD itself generates and maintains documents that contain information that is subject to the Open Records Act. For example, the RMD maintains the schedules of all state agencies that store documents at its facility. The RMD also keeps records of when it receives documents from a state agency, when an agency requests to "check out" any of its records, and when an agency returns records to the RMD. The RMD generates records of what documents it destroys and when the documents have been destroyed. All such records as well as others generated by the RMD, are those of the RMD itself. Consequently, open records requests for such records would be properly addressed to the state library.

S U M M A R Y

The director and librarian of the Texas State Library is not the officer for public records with respect to records of a state agency held in the Records Management Division as part of that agency's records management program. Open records requests are properly made to the originating agency, rather than to the state library.

Very truly yours,

A handwritten signature in black ink that reads "Dan Morales". The signature is fluid and cursive, with the first name "Dan" and last name "Morales" clearly distinguishable.

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